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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

NO. 13

RETAIL CLERKS INTERNATIONAL ASSOCIATION LOCAL 1625, AFL-CIO, ET AL., *Petitioners*

v.

ALBERTA SCHERMERHORN, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

INTEREST OF THE AFL-CIO

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

The AFL-CIO is a federation of labor unions whose total membership is approximately thirteen million. As the principal spokesman for the organized working people of this country, the Federation is vitally interested in the permissible substantive reach and the mode of enforcement of state laws, enacted pursuant to the authorization in section 14(b) of the National Labor Relations Act, prohibiting agreements requiring union membership or its practical equivalent as a condition of employment.

Petitioners have fully covered the legal arguments supporting their position that the National Labor Relations

Board has exclusive jurisdiction to enforce such substantive state prohibitions. We endorse that position, and there is no need for us to burden the Court with a repetition of petitioners' thorough presentation. We will confine ourselves for the most part to a brief statement of the practical policy reasons why removal of the states' criminal, injunctive, and other enforcement apparatus from the whole area of union security in interstate commerce is essential if there is to be avoided the danger of state interference with national labor policy.

ARGUMENT

I. Sections 8(a)(3) And 14(b) Of The National Labor Relations Act Make Violations Of Valid State "Right-To-Work" Laws Unfair Labor Practices, Subject To The Exclusive Jurisdiction Of The NLRB.

To put our subsequent policy argument in proper perspective, we will sketch in barest outline our understanding of the way in which sections 8(a)(3) and 14(b) of the National Labor Relations Act make violations of valid state "right-to-work" laws unfair labor practices, subject to the exclusive jurisdiction of the NLRB.

1. Only an express proviso to section 8(a)(3) prevents agreements conditioning employment on union membership, or its practical equivalent, from being unfair labor practices as a matter of federal law. *NLRB* v. *General Motors Corp.*, 373 U.S. 734; *Retail Clerks Local 1625* v. *Schermerhorn*, 373 U.S. 746, 756. Section 14(b) then expressly declares that "[*n*]*othing* in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization" in any state prohibiting such agreements. (Emphasis added.) Section 14(b) obviously refers to the proviso in section 8(a)(3).

Accordingly, in right-to-work states the authorization granted by the proviso for membership agreements is nullified. The general prohibitory language of section 8(a)(3) thus becomes operative, making membership agreements in right-to-work states unfair labor practices as a matter of federal law.

2. Subject to qualifications not relevant here,[1] this Court has laid down the definitive preemption rule as follows: "When an activity is arguably subject to §7 or §8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board." *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245. As we have indicated, the execution or application of agreements requiring union membership, in violation of valid state right-to-work laws, seems plainly subject, not just "arguably" subject, to the prohibition of section 8(a)(3), through the operation of section 14(b) in canceling the proviso's permission for such agreements. It follows, under the *Garmon* doctrine, that such agreements are subject to the exclusive jurisdiction of the NLRB, and that state courts or other enforcement agencies are ousted of jurisdiction.

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[1] Despite the presence of activities potentially subject to the NLRA, states retain the power to regulate as a matter of their own state law (1) conduct of "merely peripheral concern" to the federal Act, and (2) conduct "marked by violence and imminent threats to the public order." *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 244-45, 247; *Machinists* v. *Gonzales*, 356 U.S. 617; *Automobile Workers* v. *Russell*, 356 U.S. 634. In addition, the doctrine of primary jurisdiction does not prevent either a federal or state court from assuming jurisdiction over a suit under sec. 301 of the Taft-Hartley Act on a collective contract between a union and an employer, even though an unfair labor practice is also involved. *Smith* v. *Evening News Assn.*, 371 U.S. 195. No one suggests that any of these exceptions to or qualifications of the preemption doctrine are applicable in the instant case.

3. This conclusion is supported by legislative history and by the logic of prior decisions of this Court. The Hartley bill, H.R. 3020, 80th Cong., 1st Sess., as it passed the House and went to conference, contained in section 13 an express provision that agreements conditioning employment on union membership would be "divested of their character as a subject of regulation by Congress" to the extent that such agreements would be subject to the "operation and effect" of state laws restricting their execution. This unmistakable anti-preemption language was expunged in conference. In its stead was substituted the present section 14(b), which by its express terms does no more than allow the states to revoke the permission for membership agreements granted by the proviso to section 8(a)(3).

A fair interpretation of previous decisions by this Court is that state courts must defer to the exclusive competence of the NLRB to deal with arrangements or attempts at arrangements which may amount to closed shops, prohibited by section 8(a)(3) without regard to state law. See *IBEW Local 429* v. *Farnsworth & Chambers Co.*, 353 U.S. 969; *DeVries* v. *Baumgartner's Electric Construction Co.*, 359 U.S. 498; *Laborers Local 438* v. *Curry*, 371 U.S. 542. A highly anomalous situation would exist if state courts could nevertheless enforce state substantive prohibitions of union shop or agency shop arrangements. A union and employer establishing a relatively limited union shop or agency shop would face the full arsenal of state court injunctions, damages, and possible criminal sanctions. But a union and employer going all the way and creating an outright closed shop would have nothing to fear but a Labor Board remedial order. Surely such a result cannot be countenanced. The thrust of this Court's decisions regarding closed shops must be extended to cover union shops and agency shops.

Once it is recognized that a union shop or agency shop agreement is an unfair labor practice under section 8(a)(3) in states forbidding such an arrangement, it is of course no argument for concurrent state court jurisdiction to say that there is no danger of conflict between federal and state laws because their substantive prohibitions are the same. This Court laid that argument to rest as long ago as *Garner v. Teamsters Local 776*, 346 U.S. 485, 490-91, when it said: "... multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."

II. Exclusive NLRB Jurisdiction Over Conduct Made An Unfair Labor Practice By The Substantive Prohibitions Of State "Right-To-Work" Laws Is Necessary To Prevent State Interference With National Labor Policy.

As we have shown, there seems no legal reason why the Labor Board should not have exclusive jurisdiction over conduct made an unfair labor practice by the interaction of sections 8(a)(3) and 14(b) of the Act and the substantive prohibitions of state "right-to-work" laws, just as it has exclusive jurisdiction over conduct made an unfair labor practice by section 8(a)(3) directly. The practical need to prevent state interference with national labor policy reinforces this view. Exclusion of all state enforcement is necessary because it is the only feasible way (1) to keep the states from grossly abusing the limited *substantive* powers allowed them under section 14(b); (2) to eliminate rigorous state remedies whose nature is wholly incompatible with enlightened labor relations; and (3) to ensure a reasonably smooth and efficient administration of the Act.

The inevitable tendency of the states, in the enactment and enforcement of right-to-work laws, is to overstep the narrow boundaries allotted them by section 14(b), and to attempt the regulation of conduct clearly beyond their

reach. Thus, the Wyoming statute by its terms, and the South Carolina and Arkansas statutes through interpretation, purport to outlaw the exclusive hiring hall. Wyo. Laws 1963, c. 39, §5; *Branham* v. *Miller Electric Co.*, 237 So. Car. 540, 118 S.E. 2d 167 (1961); *Kaiser* v. *Price-Fewell*, 359 S.W. 2d 449 (Ark. Sup. Ct. June 4, 1962). Yet nondiscriminatory exclusive hiring halls are lawful under federal law, *Teamsters Local 357* v. *NLRB*, 365 U.S. 667, and the Labor Board has recently ruled that they are not a form of union security subject to state regulation under 14(b), *Houston Chapter, Associated General Contractors*, 143 NLRB No. 43, 53 LRRM 1299, 1963-1 CCH NLRB ¶12,427 (June 28, 1963). Iowa has used its right-to-work law to regulate the check-off. See [1956] *Iowa Atty. Gen. Op.* 188, Sept. 16, 1955, 1 CCH LRR-State Laws, Iowa ¶46,565.45. Louisiana, South Dakota, and Wyoming have taken the ultimate step of interpreting their right-to-work provisions as forbidding unions from being the exclusive bargaining representatives in units containing dissenting employees. *Piegts* v. *Meat Cutters Local 437*, 228 La. 131, 81 So. 2d 835 (1955); [1957-58] *So. Dak. Atty. Gen. Op.* 236, Sept. 3, 1958, 43 LRRM 73 (1959); *Wyo. Atty. Gen. Op.*, April 25, 1963, p. 4 (mimeo. copy). And of course this Court on several occasions has had to strike down state court assertions of jurisdiction, under the ostensible authority of right-to-work laws, over picketing and other activity arguably subject to regulation under the NLRA. See *IBEW Local 439* v. *Farnsworth & Chambers Co.*, 353 U.S. 969; *DeVries* v. *Baumgartner's Electric Construction Co.*, 359 U.S. 498; *Laborers Local 438* v. *Curry*, 371 U.S. 542.

The lesson is clear. Allowing the states to enforce the provisions of their right-to-work statutes creates entirely too inviting a vista. They will not only enforce the substantive prohibitions which section 14(b) authorizes; they will

enforce provisions which the section plainly does not authorize. The only way to be sure of being understood by all the county judges is to lay down an absolute rule that they have no power to entertain jurisdiction at all, regardless of whether the subject matter is one which section 14(b) gives the state the substantive power to prohibit.

It is no answer to say that this Court retains the power to redress state court excesses in the exercise of jurisdiction. Labor injunctions, to cite one typical state remedy, are not like other injunctions. Dissolution of such an injunction on appeal two years after its issuance does not restore the status quo ante. In the meantime the strike has died. See, *e.g.*, Frankfurter and Greene, *The Labor Injunction* 201 (1930) ("the suspension of strike activities, even temporarily, may defeat the strike for practical purposes and foredoom its resumption, even if the injunction is later lifted").

By now there has been enough experience with right-to-work laws for us to be able to assert with conviction that if the state courts are left any enforcement power, they will abuse it by asserting jurisdiction far beyond the substantive limits allowed them by section 14(b). We think this is a powerful practical argument why, in order to ensure the inviolability of federal labor policy, they should be divested of jurisdiction entirely.

Even if the state courts should be scrupulous in observing the limits of substantive power granted by section 14(b), however, the mere application of the usual state remedies would introduce a harsh and jarring note into the scheme of labor relations contemplated by the federal law. The essence of the federal system is that the "difficult and delicate responsibility" of balancing "conflicting legitimate interests" in the labor relations field should be entrusted in

the first instance to the special competence of an administrative agency, "subject to limited judicial review," and that the orders of that agency should be remedial and not punitive. *NLRB* v. *Teamsters Local 449*, 353 U.S. 87, 96; *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221; *Carpenters Local 60* v. *NLRB*, 365 U.S. 651, 655. In sharp contrast, twelve of the twenty-one states now having right-to-work statutes try to subject union security agreements to the blunt and undiscriminating processes of the criminal law.[2] Injunctive relief, obtainable directly by private litigants under varying conditions in the various states, is of course also generally provided. This is no way to regulate labor relations. Congress saw fit to let the states exercise a veto power over the federal permission for union membership agreements. But that limited prerogative should not be transformed into a license to trundle in the whole vast, inappropriate state enforcement machinery of fines, jail sentences, hasty injunctions, punitive damages, and whatever else can be put together as a means of implementing local hostility toward the concept of union security.

Exclusive Labor Board jurisdiction is also essential in order to avoid unduly cumbersome administrative procedures. We assume that at the very least "the assessment of any union-security arrangement for the purposes of §§7, 8 and 14(b), when there is significant doubt about the matter, is initially a task for the Board," and that the state courts are ousted of jurisdiction over such doubtful cases. See *Retail Clerks Local 1625* v. *Schermerhorn*, 373 U.S. 746, 755. In all likelihood, most future cases will fall into this doubtful category. Unions will be experimenting with union security arrangements hopefully beyond the reach of the sub

[2] Arkansas, Georgia, Indiana, Iowa, Nebraska, Nevada, South Carolina, South Dakota, Tennessee, Utah, Virginia, and Wyoming.

stantive power of the states under section 14(b); it would be fruitless for unions to cling to clauses plainly unlawful. Yet if past experience, as exemplified by this very case, is any guide, many state courts can be expected to assert jurisdiction in every type of union security case, provided they are left with jurisdiction over any type. Absent a blanket rule of exclusive Board jurisdiction, the following pattern is likely to emerge: a state court will issue an injunction, which will be vacated a year or so later in a per curiam order by this Court; the union security arrangement will next be presented to the NLRB for a determination of its status as a matter of federal law; if the arrangement is found subject to state proscription under section 14(b), the case will then return to the state court for a state remedy in still a *third* proceeding. So wasteful and protracted a process flies right in the face of the key federal policy of promoting the swift resolution of labor disputes.[3]

As far as substantive legal analysis is concerned, the first round of state litigation in the instance just described would be an exercise in futility, and the result of the second round would be a foregone conclusion. The only meaningful disputation would take place before the Labor Board. This, too, confirms the soundness of having the Labor Board proceeding the only proceeding.

III. If Exclusive NLRB Jurisdiction Is Not Accepted, Both Law And Policy Establish Exclusive State Jurisdiction, Not Concurrent State And NLRB Jurisdiction, As The Only Sensible Alternative.

[3] See, *e.g.*, the statement of Chairman Frank W. McCulloch of the NLRB before the United States Senate Subcommittee on Administrative Practice and Procedure: "The notorious and chronic problem of delay is the source of greatest aggravation to the Board. It is by all odds the ground for most of the criticism and complaints against the Board." Quoted in *NLRB Twenty-Sixth Annual Report* 5 (1962).

The legal and policy considerations we have set forth justify the conclusion that the NLRB has exclusive jurisdiction over union shop and agency shop arrangements made unfair labor practices through the operation of section 14(b) and state right-to-work laws, and that the state courts have no jurisdiction to remedy such unfair labor practices. However, if the Court should hold that the state courts do have jurisdiction over union shop and agency shop arrangements violative of state substantive law, we think it would then have to follow that state court jurisdiction becomes exclusive. The notion that the state courts and the Labor Board could exercise concurrent jurisdiction in this area seems to us the least logical of all the alternatives as a matter of legal theory, and the least desirable as a matter of practical policy.

Why might this Court decide that state courts have jurisdiction to enforce right-to-work laws outlawing union shops and agency shops? We can only conclude that it would be because the Court was left unconvinced that the effect of state right-to-work laws is to make such arrangements unfair labor practices as a matter of federal law. It could hardly be because the Court felt that such arrangements, although made federal unfair practices, were still left subject to state remedial processes. The latter rationale would seem contrary to everything that has been taught about preemption since *Garner* and *Garmon*. And it would also seem contrary to the decisions establishing the preempted status of efforts to secure a closed shop illegal under section 8(a)(3). See *IBEW Local 429* v. *Farnsworth & Chambers Co.*, 353 U.S. 969; *DeVries* v. *Baumgartner's Electric Construction Co.*, 359 U.S. 498; *Laborers Local 438* v. *Curry*, 371 U.S. 542. State enforcement jurisdiction over union shops and agency shops is thus dependent on their not being illegal under section 8(a)(3). Accordingly, if the state

courts are found to have jurisdiction, it must be on the ground the NLRB has none.

In practice, the existence of two forums, each with its own set of remedies, could be disastrous. Once concurrent jurisdiction is upheld, there would appear no way of assuring uniformity of administration. To obtain relief against a single discriminatory arrangement, one group of employees could go to the Labor Board and another group to a state court. Different evidence could be adduced in the different forums. Different fact-finders could evaluate even the same evidence differently. The Labor Board as a public agency might arrange a satisfactory settlement of the dispute, but the private litigants in the state action might press on with their suit. There is no need to prolong the recital. This Court fully appreciated the point in *Garner* v. *Teamsters Local 776*, 346 U.S. 485, 498-99, where it said simply: "The conflict lies in remedies, not rights. ***when two separate remedies are brought to bear on the same activity, a conflict is imminent."

We call one final item to the Court's attention. If the Court holds, as we have urged, that the state court here has no jurisdiction to provide a remedy, the reason obviously must be that the exclusive jurisdiction to provide a remedy lies with the NLRB. The Court's decision would thus necessarily resolve the jurisdictional status of both the state courts and the Labor Board. As we have said, should the Court conclude instead that the state court does have enforcement jurisdiction, we think the proper rationale would be that there was no federal unfair labor practice involved, and hence no NLRB jurisdiction. Technically, however, a decision that the Board lacks jurisdiction is not necessary to a holding that the state court possesses it. At least conceptually, the existence of state enforcement juris-

diction is consistent either with the theory that the Board has no jurisdiction, or with the theory that the Board has jurisdiction but, for some reason not yet explained, the usual preemption rules do not apply to divest the states of jurisdiction. Accordingly, if the Court upholds state jurisdiction, and yet remains dubious about the rationale that state and Board jurisdiction are here mutually exclusive, we earnestly submit that the Court as a minimum precaution should refrain from any affirmative pronouncements that the NLRB may exercise concurrent jurisdiction. Strong dictum might encumber the Court when the question of Labor Board jurisdiction is squarely presented in a case arising from an actual Board proceeding. We feel that if the present litigation leaves the Court with any doubts about the matter, a concrete situation in which both a state court and the NLRB were attempting to assert concurrent jurisdiction over a union shop or agency shop arrangement would demonstrate beyond question the utter impracticality of such a system of enforcement. State enforcement jurisdiction by itself would be bad enough. Concurrent state and Labor Board jurisdiction would compound the evil.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the brief for petitioners, the judgment of the court below should be reversed.

J. Albert Woll
General Counsel
Robert C. Mayer
Theodore J. St. Antoine
736 Bowen Building
815 Fifteenth Street, N.W.
Washington 5, D. C.

Thomas E. Harris
Associate General Counsel
815 Sixteenth Street, N.W.
Washington 6, D. C.

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